NO. 17-35105

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATES OF WASHINGTON AND MINNESOTA,

Plaintiffs-Appellees,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 2:17-cv-00141
The Honorable James L. Robart
United States District Court Judge

STATES' BRIEF REGARDING REHEARING EN BANC

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I. INTRODUCTION

In a careful, thoughtful, and narrow opinion, a panel of this Court rejected Defendants' emergency motion for stay. The panel properly held that Defendants fell short of their burden on several fronts: (1) Defendants failed to show irreparable injury because the district court order that Defendants sought to stay simply restored the status quo; (2) Defendants failed to show a likelihood of success on appeal because the Plaintiff States had established at least one clear constitutional violation (and other likely violations); and (3) the public interest and balance of harms tip decisively against Defendants.

In reaching these conclusions, the panel created no conflict with precedent of this Court or the Supreme Court; rather, the panel's opinion is firmly grounded in precedent. There is thus no basis for en banc review, especially given the interlocutory nature of Defendants' motion and the cautious approach of the panel's opinion. Granting en banc review would simply delay the merits of the preliminary injunction appeal to no substantive purpose. The Court should decline.

II. FACTS

Donald Trump campaigned on the promise that he would ban Muslims from entering the United States. In December 2015, he issued a press release entitled: "Donald J. Trump Statement on Preventing Muslim Immigration." First Amended Complaint, WD ECF 18, ¶¶ 42-43; WD ECF 18-1. In this press release, Trump asserted that "there is great hatred towards Americans by large segments of the Muslim population." WD ECF 18-1. He called for "a total and complete shutdown of Muslims entering the United States." WD ECF 18, ¶ 43; WD ECF 18-1.

Shortly after issuing this press release, Trump defended and reiterated this promise. WD ECF 18, ¶¶ 44-46. He compared the Muslim ban to the internment of Japanese Americans during World War II. WD ECF 18, ¶ 44; WD ECF 18-2. He proposed an entry process that would exclude Muslim non-citizens from the country if they admitted that they were Muslim.[1] And he steadfastly refused to rethink his position about "banning Muslims from entering the country[,]" claiming that "we have to stop with political correctness."[2]

Trump reaffirmed this promise throughout his campaign. Although Trump began referring to his plan in terms of "territories" or "extreme vetting,"

[1] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015), http://www.politico.com/trump-muslims-shutdown-hitler-comparison.

[2] The American Presidency Project, *Presidential Debates: Republican Candidates Debate in North Charleston, South Carolina* (Jan. 14, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=111395.

he continued to make it clear that he intended to enact a Muslim ban. When asked whether he was "backing off on his Muslim ban[ ]," Trump responded: "I actually don't think it's a pull-back. In fact, you could say it's an expansion." WD ECF 18, ¶ 46; WD ECF 18-4. He explained: "I'm looking now at territories. People were so upset when I used the word Muslim." WD ECF 18-4, at 7. And when asked whether "the Muslim ban still stands" he replied: "It's called extreme vetting."[3]

Even after his election, Trump maintained his position. When asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States," he replied: "You know my plans. All along, I've been proven to be right."[4]

Within one week of taking office, President Trump acted on this promise by signing Executive Order No. 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("the Executive Order"). WD ECF 18, ¶ 49; WD ECF 18-7. The Executive Order radically changed immigration policy. It imposed a 120-day moratorium on the refugee resettlement program; indefinitely suspended the entry of Syrian refugees; and suspended for 90 days the entry of all immigrants and nonimmigrants from seven majority-Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. WD ECF 18, ¶¶ 49-52; WD ECF 18-7. When signing the Executive Order, President Trump read its title aloud and said: "We all know what that means."[5]

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[3] The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=119038.

[4] *President-Elect Trump Remarks in Palm Beach, Florida*, C-SPAN (Dec. 21, 2016), https://www.c-span.org/video/?420583-1/presidentelect-trump-calls-berlin-terrorist-attack-attack-humanity.

President Trump and his advisors subsequently confirmed the Executive Order's discriminatory purpose. *See* WD ECF 18, ¶¶ 53, 61. One advisor indicated that the Executive Order was crafted to be a "legal" ban on Muslims. WD ECF 18, ¶ 61. He explained that President Trump wanted to enact a "Muslim ban" and instructed him to "put a commission together" to "show [Trump] the right way to do it legally." WD ECF 18, ¶ 61. In addition, President Trump confirmed that Christians in the Middle East would be given priority for admission as refugees. WD ECF 18, ¶ 53.

The Executive Order unleashed chaos around the world. Over the next few days, nearly 60,000 visas were revoked,[6] hundreds of people were prevented from boarding airplanes bound for the United States or denied entry upon landing, and many travelers were detained at U.S. airports.[7] This chaos was compounded by Defendants' conflicting and ever-changing positions about the applicability of the Executive Order to lawful permanent residents. WD ECF 18, ¶¶ 57-59; WD ECF 18-13; WD ECF 18-14; WD ECF 18-15.[8]

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[5] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173.

[6] Jaweed Kaleem, *Nearly 60,000 visas revoked since Trump's immigration order*, Los Angeles Times (Feb. 3, 2017),

The States of Washington and Minnesota were immediately and significantly impacted. Over 7,000 noncitizen immigrants from the affected countries reside in Washington, and thousands more are U.S. citizens. WD ECF 18, ¶ 11; WD ECF 4, ¶ 7, Ex. A. Over 30,000 Minnesota residents were born in the affected countries. WD ECF 18, ¶ 31. Their lives changed overnight. WD ECF 18, ¶¶ 21-23; WD ECF 33, ¶¶ 5-9; WD ECF 8, ¶¶ 11-13; WD ECF 43, ¶¶ 5-9. Residents temporarily abroad were blocked from returning home. WD ECF 33, ¶¶ 7-8. Residents in the United States faced considerable uncertainty about whether they could travel and whether

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http://www.latimes.com/politics/washington/la-na-essential-washington-updates-more-than-100-000-visas-revoked-since-1486148132-htmlstory.html.

[7] Glenn Kessler, *The number of people affected by Trump's travel ban: About 90,000*, Washington Post (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.caa5dc63b2c4.

[8] *See also* Evan Perez, Pamela Brown, & Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, CNN (Jan. 30, 2017), http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html.

vulnerable loved ones would be able to join them. WD ECF 8, ¶¶ 5, 7; WD ECF 18, ¶ 22; WD ECF 33, ¶¶ 7-8. For some with serious medical conditions, the situation was especially dire. *See, e.g.*, WD ECF 33, ¶ 8; WD ECF 43, ¶ 5. This chaos and uncertainty tore families apart, undermined personal freedoms, jeopardized individuals' economic security, and endangered the lives and safety of many.

The States' economies and businesses were also immediately impacted. WD ECF 18, ¶¶ 12-17, 35. Washington receives substantial sales tax revenue every year from travelers from the seven countries and immediately began losing some of that revenue. *See* WD ECF 17-1, ¶¶ 3-11. Washington-based travel company Expedia began incurring costs assisting its customers who were suddenly banned from travel to the United States. WD ECF 7, ¶¶ 12-14, 20. Washington companies Amazon, Expedia, and Microsoft depend on skilled immigrants to operate and grow their businesses, and the Executive Order diminished their ability to recruit. WD ECF 18, ¶¶ 12-17; WD ECF 6, ¶¶ 3-4, 11; WD ECF 7, ¶¶ 7, 9, 21. Further, many employees were unable to travel internationally, which impaired business operations. WD ECF 7, ¶¶ 15-20; WD ECF 6, ¶¶ 7-11; WD ECF 18, ¶¶ 14-15.

The Executive Order also caused immediate harm to the States' public universities, which are state agencies. Hundreds of their faculty, staff, and students are from the affected countries. WD ECF 18, ¶¶ 28, 32; WD ECF 9, ¶ 5; WD ECF 5, ¶ 5; WD ECF 17-3, ¶¶ 4, 6; WD ECF 17-2, ¶ 10; WD ECF 17-4, ¶ 5. The Executive Order instantly stranded some faculty members and students overseas, prevented others from traveling for scholarship or family visits, halted critical research, jeopardized research programs, and harmed the universities' overall academic missions.[9] WD ECF 9, ¶¶ 6-8; WD ECF 5, ¶¶ 6-9; WD ECF 17-2, ¶¶ 3-13; WD ECF 17-4, ¶¶ 5-8; WD ECF 67, ¶ 2. In addition, the Executive Order exposed the universities to various financial losses, including lost investments on visas for interns and employees the universities had sponsored, lost conference fees, and lost tuition. WD ECF 18, ¶¶ 26-27; WD ECF 17-2, ¶ 10; WD ECF 66, ¶¶ 4-8; WD ECF 67, ¶¶ 2-4.

Due to these immediate and serious harms, Washington filed a complaint and motion for temporary restraining order (TRO) on January 30. WD ECF 3. Minnesota soon joined, alleging similar harms. *See* WD ECF 18, ¶¶ 30-36. On

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[9] A video documenting the impact on members of Washington State University's Iranian Students Association of WSU is available online at Meisam Haghighi, *Beyond the Visa Ban: Inside* Stories (Feb. 2, 2017), https://www.youtube.com/watch?feature=youtu.be&v=i3hOwva8isc&app=desktop.

February 3, the district court entered a TRO barring Defendants from enforcing several sections of the Order. WD ECF 52.

The TRO had immediate, positive effects: families were able to reunite, students and faculty were able to return home, and travel for business and to visit loved ones resumed.[10] The State Department declared that it was reinstating visas that had been revoked pursuant to the Executive Order. 9th ECF 29-1, Exs. A, B. The Department of Homeland Security started processing travelers with visas as normal and began processing travelers with standard inspection and security procedures. *Id.* Exs. E, B, F. Customs and Border Protection directed that nationals of the seven countries and refugees presenting a valid visa or green card be permitted to travel to the United States. *Id.* Ex. G. Major airlines announced that they would comply with this directive, and travelers from the previously banned countries began arriving at U.S. airports. *Id.*, Exs. G, H, I, J, B, D.

On February 4, Defendants noticed an appeal of the TRO and sought an emergency stay. WD ECF 53; Emergency Motion Under Circuit Rule 27-3 for

[10] *E.g.*, Lynda Mapes, *Joy at Sea-Tac: Families reunite after courts halt travel ban*, Seattle Times (Feb. 5, 2017), http://www.seattletimes.com/seattle-news/crime/joy-at-sea-tac-families-reunite-after-courts-postpone-travel-ban/; Mathis, *Travelers Arrive in US to Hugs and Tears After Ban Is Lifted*, New York Times (Feb. 5, 2017), https://www.nytimes.com/aponline/2017/02/04/us/ap-us-trump-travel-ban-impact.html?_r=0.

Administrative Stay and Motion for Stay Pending Appeal, No. 17-35105. 9th ECF 14. A three-judge panel of this Court denied Defendants' request for an immediate administrative stay and set deadlines for briefing on Defendants' emergency stay motion. *Washington v. Trump*, 2017 WL 469608 (9th Cir. Feb. 4, 2017). On February 7, the panel heard oral argument on the emergency stay motion. Two days later, it issued a published, per curiam order denying the motion, *Washington v. Trump*, 2017 WL 526497 (9th Cir. Feb. 9, 2017), and it set an expedited briefing schedule for the appeal. 9th ECF 135.

The panel concluded that Defendants had not satisfied their burden in several respects. For one, the panel concluded that Defendants had not shown a likelihood of success on the merits of their appeal, because the States have viable due process claims and may also succeed on their religious discrimination claims. *See Washington*, 2017 WL 526497, at *8-10. The panel also concluded that Defendants failed to show irreparable injury, because the TRO simply restored the status quo. *Id.* at *10. Finally, the panel concluded that the competing public interests do not justify a stay. *Id.* at *11.

On February 10, this Court requested briefing from the parties on whether the order issued by the three judge panel should be reconsidered en banc. ECF 139 (Order, No. 17-35105 (9th Cir. Feb. 10, 2017)).

III. ARGUMENT

The panel properly denied a stay of the district court's order. Briefing on the merits of the preliminary injunction appeal is proceeding on an expedited schedule. There is no need for en banc review of the panel's interlocutory decision, which correctly stated the standard for obtaining a stay, correctly articulated the controlling legal principles, and properly applied those principles to the facts presented.

A. The Criteria Justifying En Banc Review Are Missing Here

En banc reconsideration of the panel's order is unwarranted because the threshold criteria for such extraordinary review are not satisfied under the Circuit's rules for en banc reconsideration of a motions panel order or the broader principles governing en banc review.

Under the Circuit Rules, en banc reconsideration of an order issued by a motions panel (as opposed to a merits panel) is "not favored," and requires a showing that the panel has "overlooked or misunderstood a point of law or fact" or that there has been "a change in legal or factual circumstances after the order which would entitle the movant to relief." Circuit Advisory Committee Note to Rule 27-10; *see* Cir. Rule 27-10(a)(3), (b). This case does not meet those criteria.

First, the panel's order thoroughly considered the legal precedent and the parties' arguments and neither overlooked nor misunderstood a point of law or fact. As detailed in the remainder of this brief, the panel's legal conclusions are amply supported by precedent. *See infra* at 13-53. And the panel's factual conclusions are unassailable, especially given that Defendants have submitted no evidence whatsoever, either in opposing the States' request for TRO in the district court or in support of their motion for stay. *See Washington*, 2017 WL 526497, at *10-11. In fact, the panel repeatedly pressed Defendants about the factual basis for Defendants' position, but Defendants offered none. Oral Argument at 1:05:14-1:05:46, *Washington v. Trump*, No. 17-35105 (Feb. 7, 2017), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885; *see also Washington*, 2017 WL 526497, at *10 n.8 (noting that Defendants could have shared classified information with the Court under seal, but did not).

Second, there has been no "change in legal or factual circumstances after the order which would entitle the movant to relief." Circuit Advisory Committee Note to Rule 27-10; *see* Cir. Rule 27-10(a)(3), (b). To the contrary, the most relevant legal development since the panel opinion came when the U.S. District Court for the Eastern District of Virginia recently granted

Virginia's motion for a preliminary injunction in a similar challenge to the Executive Order and provided further support for the panel's conclusions. *See Aziz v. Trump*, 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

En banc review is also unwarranted under the well-established principles governing such review generally. The Court typically grants such review only where "the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity[.]" Cir. Rule 35-1; *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003); *United States v. Alvarez*, 638 F.3d 666, 676 (9th Cir. 2011) (Smith, J. and Kozinski, J., concurring in denial of rehearing en banc).[11] Here, Defendants cannot plausibly assert a conflict between the panel's opinion and any other opinion of this Court, another court of appeals, or the Supreme Court.

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[11] *See also, e.g.*, *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) ("En banc courts are the exception, not the rule."); *Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990) ("Rehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions."); *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (Wardlaw and Callahan, JJ., concurring in denial of rehearing en banc) (*id.* at 1180, explaining such review unwarranted where "panel opinion faithfully follows our circuit's precedent, creates no inter-circuit split, does not present an issue of exceptional importance"); *United States v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in order denying rehearing en banc) (stating "criteria for taking a case en banc are clear and well-established—either necessity to secure or maintain uniformity of the court's decisions, or to decide a question of exceptional importance," and collecting cases (internal quotation marks omitted)).

Finally, it is noteworthy that Defendants have sought neither en banc review nor emergency relief from the Supreme Court. Rather, they have stated an intent to litigate this case on the merits in the district court.[12] Even where an issue "is exceptionally important," the issue may not warrant en banc review where it "does not matter to the parties," is "not inconsistent with Ninth Circuit precedent, and does not resolve a circuit split." *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1005-06 (9th Cir. 2003) (Rymer, J., writing separately to dismiss en banc review as improvidently granted). En banc review is thus inappropriate on many independent grounds.

B. The Panel Correctly Described the Standard for Obtaining a Stay

As the panel explained: "A stay is not a matter of right, even if irreparable injury might otherwise result." *Washington*, 2017 WL 526497, at *7 (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). Defendants bear the heavy burden

[12] *See, e.g.*, Jordan Fabian & Ben Kamisar, *Confusion as Priebus says maybe Trump will go to Supreme Court*, The Hill, http://thehill.com/homenews/administration/319029-trump-not-planning-to-appeal-travel-ban-ruling-to-supreme-court (Feb. 10, 2017); Ryan Lovelace, *Full 9th Circuit may review Trump immigration ban ruling*, Wash. Examiner, http://www.washingtonexaminer.com/full-9th-circuit-may-review-trump-immigration-band-ruling/article/2614556 (Feb. 10, 2017).

of showing (1) a strong likelihood of success on the merits, (2) the likelihood of irreparable injury if relief is not granted, (3) a balance of hardships favoring Defendants, and (4) that reinstating the Executive Order is in the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The first two factors are the most critical. *Nken*, 556 U.S. at 434.[13] As detailed below, the panel properly concluded that Defendants failed to meet their burden here.

C. The Panel Correctly Concluded That the States Have Standing

The States established standing by demonstrating that they have suffered concrete, actual, and imminent injuries; that these injuries are traceable to the Executive Order; and that the injuries will be remedied by a favorable decision. *Washington*, 2017 WL 526497, at *3; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As the panel correctly noted, "[a]t this very preliminary stage of the litigation," the States may rely on allegations in the complaint and the evidence filed in support of the motion for a TRO to establish standing. *Washington*, 2017 WL 526497, at *3 (citing *Lujan*, 504 U.S. at 561); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014); *Am. Fed'n of Gov't*

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[13] The States argued to the panel that the temporary restraining order was not appealable and that Defendants' only remedy was mandamus. The panel rejected the States' argument. *Washington*, 2017 WL 526497, at *2-3. Without waiving the issue, the States do not request that this aspect of the panel's decision be reviewed en banc.

Emps. Local 1 v. Stone, 502 F.3d 1027, 1032 (9th Cir. 2007) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

The panel correctly held that the States have standing based on injury to their proprietary interests. *Washington*, 2017 WL 526497, at *5. And though the panel found no need to reach the issue, the States also have standing as *parens patriae* to protect their quasi-sovereign interests in the well-being of state residents. *Id.* at *4-5, n.5.

1. The States have proprietary standing

The panel correctly concluded that the Executive Order has caused concrete and particularized injuries to the States' proprietary interests. *Id.* at *5. Proprietary standing can be established based on even modest financial harms. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (recognizing that important interests may be vindicated with no more at stake than a $5 fine or a $1.50 poll tax); *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (holding that an "identifiable trifle" is sufficient to establish standing); *Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015) (holding that Texas had standing to challenge a federal immigration directive based solely on the cost of issuing driver's licenses to the beneficiaries of deferred immigration action—approximately $130 per license).

The Executive Order has caused significant and direct harm to the States' universities, which are branches of the States. *Washington*, 2017 WL 526497, at *3-4. As the panel found, "students and faculty cannot travel for research, academic collaboration, or for personal reasons, and their families abroad cannot visit. Some have been stranded outside the country, unable to return to the universities at all." *Id*. at *4. Meanwhile, "[t]he schools cannot consider attractive student candidates and cannot hire faculty from the seven affected countries, which they have done in the past," and the schools have incurred costs, including costs of visa applications, that will be lost under the Order. *Id.* The panel did not invent these harms; they are firmly grounded in the record. *See* WD ECF 9, ¶¶ 5, 7-8; WD ECF 5, ¶ 5; WD ECF 17-2, ¶¶ 4-10; WD ECF 17-3, ¶¶ 4, 6; WD ECF 17-4, ¶¶ 3,7;[14] WD ECF 66, ¶¶ 5-8. The bottom line is that it is essentially undisputed that the Executive Order has harmed both the financial well-being and the academic mission of the schools.

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[14] The Executive Order is harming universities across the country. *See* Abby Jackson, *The 10 US colleges that stand to lose the most from Trump's immigration ban*, Business Insider (Feb. 1, 2017), http://www.businessinsider.com/colleges-potentially-most-affected-trump-immigration-ban-2017-2.

As the panel recognized, these injuries to the state universities give the States standing, including standing to assert the rights of the students, scholars, and faculty affected by the Order. *Washington*, 2017 WL 526497, at *4. Citing a mountain of authority, the panel noted that "schools have been permitted to assert the rights of their students." *Id*. (citing *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976) (holding that schools have standing to assert arguments on behalf of students)); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487-88 (9th Cir. 1995) (rejecting argument that school lacked standing to claim discrimination against minority students). And more generally, the panel noted that the harms to the state universities and their students easily meet traditional third party standing principles because the state universities' injuries are "inextricably bound up" with their students' interests and the universities are "fully, or very nearly, as effective a proponent" of the students' rights. *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976); *see also, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (allowing doctors to assert patients' interests); *NAACP v. Alabama*, 357 U.S. 449 (1958) (allowing an organization to pursue a discrimination claim on behalf of its members).

Though the panel saw no need to go beyond the proprietary harms to the States' universities, the States also suffered injuries to their proprietary interests by a loss of tax revenue. Washington receives substantial tax revenues every year from travelers from the countries impacted by the travel ban. WD ECF 17-1, ¶¶ 3-8. Washington also stands to lose tax revenue from businesses harmed by the Order, as well as revenue from legal, non-citizen residents who are being prevented from returning to their homes and jobs. WD ECF 17-1,¶ 6; WD ECF 7, ¶¶ 9, 11-12; WD ECF 8, ¶¶ 6-14. Losing these tax revenues is a real, tangible, and immediate harm, even putting aside the Order's longer-term consequences for the States' economies. WD ECF 18, ¶¶ 12-17, 24-25; *see, e.g.*, *Sausalito v. Oneill*, 386 F.3d 1186, 1198 (9th Cir. 2004) (holding that lost property and sales tax revenues caused by increased traffic established standing without any numeric quantification of the harm).

The direct impacts to the States' universities, students, faculty, and tax revenue cement the injury-in-fact required for proprietary standing. Far from being speculative, these impacts began occurring the moment the Order took effect.

2. The States have standing as *parens patriae*

In addition to proprietary standing, the States' have standing to protect their residents as *parens patriae*. Having concluded that the States have proprietary standing, the panel did not address this alternative theory of standing. *Washington*, 2017 WL 526497, at *5 n.5. But it provides an independent basis for the States' claims to proceed, as the district court recognized. WD ECF 52 at 4-5.

As the Supreme Court has long held, when the states joined the union "[t]hey did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests" in the federal courts. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). More recent Supreme Court decisions confirm that each state has *parens patriae* standing to protect "the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 593 (1982). In *Snapp*, the Court held that states have standing to sue based on discrimination against their residents: "This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils." *Id*. at 609.

As in *Snapp*, the States brought this action to protect against the impacts of discrimination. The Executive Order caused grievous harm to state residents' well-being during the week it was in place, including harms to those originally from the listed countries who: were temporarily overseas and were prevented from returning to their homes, jobs and families; live in the States and wished to travel overseas for professional or personal reasons; or live in the States and were unable to receive visits from their friends and family. WD ECF 8, ¶¶ 6-14; WD ECF 18, ¶¶ 18-23, 31-36. The Executive Order affects not just those individuals, but also Washington and Minnesota residents who have emphatically rejected the discrimination embodied in the Order. *See, e.g.*, Wash. Rev. Code § 49.60.010; Minn. Stat. § 363A.02.

Defendants never meaningfully disputed these harms, instead arguing that state *parens patriae* suits against the federal government are forbidden by *Massachusetts v. Mellon*, 262 U.S. 447 (1923). Not so. As the Supreme Court has recognized, "*Mellon* itself disavowed any such broad reading when it noted that the Court had been 'called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] *not quasi-sovereign rights actually invaded or threatened.*'" *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (alteration in original) (quoting *Mellon*, 262 U.S. at 484-85). And in *Massachusetts v. EPA*, the Court clarified that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id*. Here, the States seek not to protect their residents from federal statutes, but to protect their residents against Defendants' violations of federal law. This is what States "ha[ve] standing to do." *Id.*

The right of the States to ensure that their residents "are not excluded from the benefits" of the federal system also was specifically recognized in *Snapp*. *Snapp*, 458 U.S. at 608. The Court determined that "the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Id*. By the same token, the States need not wait for the federal government to vindicate their residents' constitutional rights to due process and religious freedom. In addition to protecting constitutional rights, *Snapp* specifically holds that States have *parens* standing to eliminate discrimination by pursuing their residents' interests in protection under federal immigration statutes. *Id.* at 609-10. Thus, the States have standing to pursue the protections against discrimination afforded by the Immigration and Nationality Act of 1965. 8 U.S.C. § 1152(a)(1)(A).

D. The Panel Correctly Concluded That Courts Have Power to Review Executive Action, Even When It Relates to National Security or Immigration

Defendants contend that President Trump wields "unreviewable" authority to make immigration policy. *Washington*, 2017 WL 526497, at *5.

Not so. As the panel correctly held: "There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy." *Id.*

The Supreme Court has consistently held that the Constitution does not grant the President or Congress "the power to decide when and where its terms apply." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). Even "concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). Although substantial deference is provided to national security decisions, the courts' "time-honored and constitutionally mandated roles of reviewing and resolving claims" are not displaced even by "threats to military operations." *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion).

The panel correctly recognized and applied these principles here, explaining that "the Government's 'authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.'" *Washington*, 2017 WL 526497, at *6 (alterations in original) (quoting *Humanitarian Law Project*, 561 U.S. at 34). Defendants' assertion of "unreviewable" authority is not unique to this litigation. But abdicating the courts' constitutional role would be.

Similarly, despite Defendants' references to "plenary" power over immigration, 9th ECF 14 at 4—which actually resides with Congress, *see* U.S. Const., art. I, § 8—the panel also properly recognized that the political branches' power over immigration is "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Supreme Court has confirmed the judicial authority to review "whether Congress has chosen a constitutionally permissible means" of exercising its immigration power. *INS v. Chadha*, 462 U.S. 919, 941 (1983). As the panel explained, the Ninth Circuit "has likewise made clear that '[a]lthough alienage classifications are closely connected to matters of foreign policy and national security,' courts 'can and do review foreign policy arguments'" to ensure protection of constitutional rights. *Washington*, 2017 WL 526497, at *5 (quoting *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995)); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (refusing to defer to DHS's regulations because the regulations "raise[d] serious constitutional concerns").

Finally, the panel correctly determined that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), "does not compel a different conclusion." *Washington*, 2017 WL 526497, at *6. *Mandel* involved an executive branch decision to deny a visa to an individual. The Court held that it would not look behind the stated reasons for such a decision if the denial was supported by a "facially legitimate and bona fide" reason. *Mandel*, 408 U.S. at 769. But unlike *Mandel*, this case does not involve the application of a congressionally established policy to one individual non-resident alien. The challenge is to radical changes in "immigration policy" ordered by executive fiat, not the application of congressionally enacted standards to an individual. *Washington*, 2017 WL 526497, at *6.

The Supreme Court's consistent recognition of judicial authority to review the constitutionality of immigration and national security decisions makes eminent sense in light of our nation's troubling experience with blanket decrees based on nationality. If our history teaches anything, it is that courts should exercise caution when asked to defer to the federal government's claim that its expertise in foreign affairs entitles it to engage in class-based discrimination. *Cf. Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (citing Congress's judgment that "the presence of foreigners of a different race in this country, who will not assimilate with us, [is] dangerous to [the country's] peace and security"). "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).

There is simply no support for Defendants' insistence that the courts lack authority to consider the constitutionality of the Executive Order.

E. The Panel Correctly Concluded That Defendants Failed To Show a Likelihood of Success on Appeal

The States' complaint alleges that the Order violates many constitutional and statutory provisions. WD ECF 18. While all of those claims have merit, time and space constraints forced the States to brief only four of the claims in the TRO motion. The panel understandably issued a narrow opinion that focused primarily on the States' likelihood of success on just one of those claims, while noting that other claims "raise serious allegations and present significant constitutional questions." *Washington*, 2017 WL 526497, at *10. The panel was correct in concluding that Defendants failed to show a likelihood of success on appeal.

1. Defendants failed to show a likelihood of success on the Due Process claim

The panel concluded that Defendants failed to meet their burden to obtain a stay because they showed no likelihood of success on appeal as to the States' due process claim. The panel was correct.

As the panel explained, the States have alleged that the Order violates due process "in at least three independent ways." *Washington*, 2017 WL 526497, at *8. First, the Order "denies re-entry to certain lawful permanent residents and non-immigrant visaholders without constitutionally sufficient notice and an opportunity to respond." *Id.* Second, the Order prohibits "certain lawful permanent residents and non-immigrant visaholders from exercising their separate and independent constitutionally protected liberty interests in travelling abroad and thereafter re-entering the United States." *Id.* And third, section 5 of the Order "contravenes the procedures provided by federal statute for refugees seeking asylum and related relief in the United States." *Id.* The panel correctly held that Defendants had failed to rebut any of these arguments.

Starting with the first two violations, the Order denies entry to the United States of all persons from the seven impacted countries, regardless of whether they have lived legally in this country for years. Thus, our States' residents from these countries who travel abroad will be deported if they attempt to re-enter the United States, and those who remain will be forced to forego international travel to avoid that devastating result. This draconian restriction violates due process.

The Fifth Amendment protects all persons in the United States "from deprivation of life, liberty, or property without due process of law," regardless of immigration status. *Mathews v. Diaz*, 426 U.S. 67, 69, 77 (1976); *Zadvydas*, 533 U.S. at 693. A temporary absence from the country does not deprive longtime residents of their right to due process. *See*, *e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him."); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953).

Due process requires that lawful permanent residents and visaholders not be denied re-entry to the United States without "at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014). A resident denied re-entry must receive a "full and fair hearing of his claims" and "a reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011).

The Order's denial of re-entry to all visaholders and lawful permanent residents from the impacted countries, without an opportunity to be heard, violates these principles. The Order also deprives non-citizen residents of our States of the right to travel, a constitutionally protected liberty interest. *Kent v.*

Dulles, 357 U.S. 116, 125-26 (1958) (holding that Secretary of State could not deny passports to Communists on the basis that right to travel abroad is a constitutionally protected liberty interest).

The Order also independently violates due process by denying refugees and asylum seekers statutory rights guaranteed to them by Congress. Congress has created a statutory right whereby persons persecuted in their own country may petition for asylum in the United States.[15] Federal law prohibits the return of a noncitizen to a country where he may face torture or persecution.[16] Congress has established procedures to implement those statutory rights, which include providing refugees the right to present evidence in support of a claim for asylum, to move for reconsideration of an adverse decision, and to seek judicial review of a final order denying their claims. *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004).

In enacting these statutory rights, Congress "created, at a minimum, a constitutionally protected right to petition our government for political

[15] 8 U.S.C. § 1158(a)(1) ("[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section").

[16] *See* 8 U.S.C. § 1231(b); United Nations Convention Against Torture, implemented in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

asylum." *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982). The constitutionally protected right to petition for asylum "invoke[s] the guarantee of due process." *Id*. at 1039; *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *see also Lanza*, 389 F.3d at 927 ("The due process afforded aliens stems from those statutory rights granted by Congress and the principle that minimum due process rights attach to statutory rights."). Due process requires at a minimum that refugees seeking asylum receive a "full and fair hearing." *Zetino v. Holder*, 622 F.3d 1007, 1013 (9th Cir. 2010).

The Order violates these rights because it provides no avenue for refugees to have their asylum claims heard. Instead, it explicitly states that the United States will not entertain asylum claims from certain groups for a specified period of time, regardless of their merits. This contravenes the due process requirement that refugees receive a "full and fair hearing" on their claims for relief. *Zetino*, 622 F.3d at 1013.

Defendants never meaningfully contested these fundamental due process principles before the panel. *Washington*, 2017 WL 526497, at *8 ("The Government has provided no affirmative argument showing that the States' procedural due process claims fail."). Instead, they offered three arguments as to why the States could show no violation here. All fail.

First, Defendants argued that the States' due process claims were effectively moot because—after much vacillation—they now interpret the Order not to apply to lawful permanent residents. But the panel properly rejected this argument because: (1) Defendants originally interpreted the Order to apply to lawful permanent residents, never changed the text of the Order, and offered no authority for the claim that their new interpretation would be binding going forward, thus leaving the panel unable to find it "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Washington*, 2017 WL 526497, at *8 (quoting *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000))[17]; and (2) even if the Order no longer applied to lawful permanent residents, it would still apply to other longtime resident aliens who have due process rights, e.g., "non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart." *Washington*, 2017 WL 526497, at *9 (citing *Landon*, 459 U.S. at 33-34).

Second, Defendants cited *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), for the proposition that States cannot raise due process claims. But the panel properly rejected that argument because *Katzenbach*, unlike this case, involved no proprietary harms to a State. *Washington*, 2017 WL 526497, at *4-5.Where, as here, a state asserts harms to students and faculty at its institutions, the State should be allowed—just like any other proprietor of educational institutions—to raise due process claims on their behalf. *See id.* at *4 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 (9th Cir.1995); *Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996)); *see also Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 943 (9th Cir. 1993).[18]

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[17] *See also White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (mootness based on voluntary cessation is a "stringent" standard).

Finally, for the first time in their reply brief, Defendants argued that there could be no due process violation in this case because "'notice and an opportunity to respond' is not required where, as here, the challenged rule reflects a categorical judgment." 9th ECF 70 at 9 (citing *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445 (1915)). But this argument fails

[18] Though the panel found it unnecessary to reach this issue, *Katzenbach* does not control even as to the States' *parens patriae* claims. *Katzenbach* cited *Mellon* in holding that South Carolina could not use its *parens* authority to challenge a federal statute. 383 U.S. at 323-24. But in *Massachusetts v. EPA*, the Court clarified that "there is a critical difference between allowing a State to protect her citizens from the operation of federal statutes (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17. Here, the States seek not to protect our residents from federal statutes, but to protect our residents against Defendants' violations of federal law. This is what States "ha[ve] standing to do." *Id.*

for a number of reasons (in addition to being raised too late). First, Supreme Court precedent makes clear that many of the rights implicated by this Order are fundamental, including "the right to rejoin [one's] immediate family," *Landon*, 459 U.S. at 34, the right of longtime residents to temporarily leave and reenter the country, *id.*, and the right to travel abroad. *Kent*, 357 U.S. at 125-26. Such rights cannot be taken away without an individualized proceeding that "meet[s] the essential standard of fairness under the Due Process Clause." *Landon*, 459 U.S. at 34. Second, to the States' knowledge, the *Bi-Metallic* doctrine has never been applied to an executive order, perhaps because executive orders include no opportunity for public comment or input, unlike statutes or administrative rules. *Cf. Gallo v. U.S. Dist. Court For Dist. of Arizona*, 349 F.3d 1169, 1181 (9th Cir. 2003) ("When the action is purely legislative, the statute satisfies due process if the enacting body provides public notice and open hearings."). Finally, even if *Bi-Metallic* did apply to executive orders, it would not apply here because this order contemplates at least some measure of individualized assessment via standardless, "case-by-case" decisions by the Secretaries of State and Homeland Security about whether an individual should be admitted to this country "when in the national interest." Executive Order § 3(g). The Order thus involves at least some degree of individualized assessment that takes its provisions outside the *Bi-Metallic* framework. *Cf. Harris v. Cty. of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990) ("In determining when the dictates of due process apply . . . we find little guidance in formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions. As the Supreme Court impliedly recognized in *Bi-Metallic*, the character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process.").

In short, the panel correctly concluded that Defendants failed to show that they are likely to succeed on appeal as to the States' due process claims.

2. Defendants failed to show a likelihood of success on the States' religious discrimination claims

The panel saw no need to finally determine whether Defendants have a likelihood of success on appeal as to the States' claims based on the Establishment and Equal Protection Clauses, "reserv[ing] consideration of these claims until the merits of this appeal have been fully briefed." *Washington*, 2017 WL 526497, at *10. But the panel expressed strong skepticism about Defendants' likelihood of success on appeal as to these claims, *id.*, and rightly so. Both claims are extremely strong, especially considering that the case is still at the pleading stage and the States have had no opportunity for discovery.

a. The States are likely to prevail on the Establishment Clause claim

The Order violates the Establishment Clause of the First Amendment because its purpose and effect is to disfavor Muslims. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). As the panel explained, "endorsement of a religion 'sends the ancillary message to . . . nonadherents that they are outsiders, not full members of the political community.'" *Washington*, 2017 WL 526497, at *10 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (citation omitted)).

The Order violates the Establishment Clause by creating a religious preference, and is thus subject to strict scrutiny. *See Larson*, 456 U.S. at 246-47. In *Larson*, the law at issue did not mention any religious denomination by name, but drew a distinction between religious groups based on the percentage of their revenue received from non-members, which had the effect of harming certain religious groups. *Id.* at 231-32. Because the law was focused on religious entities and had the effect of distinguishing between them in a way that favored some, the Court applied strict scrutiny. *Id.* at 246-47.

Similarly here, Section 5(b) of the Executive Order grants priority to "refugee claims made by individuals on the basis of religious-based persecution," but only if "the religion of the individual is a minority religion in the individual's country of nationality." There is overwhelming evidence that the purpose of this provision is to tilt the scales in favor of Christian refugees at the expense of Muslims. WD ECF 18, ¶ 53, Ex. 8. For example, during an interview with the Christian Broadcasting Network, President Trump confirmed that persecuted Christians were "a priority." WD ECF 18-8. He explained:

> They've [Christians] been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

WD ECF 18-8. While Defendants have argued that the President's intent cannot be considered, the panel correctly rejected that argument, recognizing that "evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Washington*, 2017 WL 526497, at *10 (citing *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (explaining that action targeting religion "cannot be shielded by mere compliance with the requirement of facial neutrality")); *see also, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment) (holding that courts may "look behind" stated motives where "an affirmative showing of bad faith" is "plausibly alleged with sufficient particularity"); *INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (looking to the "historical record" to determine whether actions were "motivated by any racial animus"). The Court thus has the authority and duty to test the Executive's intent for compliance with the law.

The bottom line is that the Executive Order fails the *Larson* test. Affording preferred status to individuals of certain faiths is "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Pangilinan*, 456 U.S. at 255.

Moreover, even if the Order did not distinguish between denominations, it would violate the Establishment Clause because it fails the "*Lemon* test." *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test requires that a government action (1) have a secular legislative purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster excessive government entanglement with religion. *Id.* at 612-13. Defendants must satisfy all three prongs, but here they satisfy none.

First, the Order's purpose is not "secular" because President Trump's purpose in issuing this Order—as confirmed by his own public statements—is to "endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 75-76 (1985). The secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864-65 (2005). In determining intent, the Supreme Court has refused to ignore prior statements of decision makers. *Id.* at 866. "[T]he world is not made brand new every morning," and the courts will not " 'turn a blind eye to the context in which [a] policy arose.' " *Id.* at 866 (quoting *Santa Fe*, 530 U.S. at 315). As the Supreme Court has explained, this inquiry into purpose at times requires invalidation of an action that otherwise would have been constitutional: "One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id.* at 866 n.14. Given the evidence that President Trump's actual purpose in issuing this Order is to "endorse or disapprove of religion," the Order violates the first prong of the *Lemon* test. *Wallace*, 472 U.S. at 56.

The Order also violates *Lemon*'s second prong, which requires that the "principal or primary effect . . . be one that neither advances nor inhibits religion[.]" *Lemon*, 403 U.S. at 612. Governmental action violates this prong "if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1256 (9th Cir. 2007) (internalquotation marks omitted). The court analyzes this prong "from the point of view of a reasonable observer who is 'informed . . . [and] familiar with the history of the government practice at issue.'" *Id.* (alterations in original) (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994)). Thus, the question here is whether an informed, reasonable observer would perceive this Order as an endorsement of one religion, as disapproval of another, or both. In light of the evidence cited above, there is little question that the answer to this question is yes.

As to the third prong, the Executive Order "foster[s] 'an excessive governmental entanglement with religion'" by favoring one religious group over another, which "'engender[s] a risk of politicizing religion.'" *Larson*, 456 U.S. at 252, 253 (quoting *Walz*, 397 U.S. at 674, 695). Selectively burdening Muslims and favoring Christians creates improper "entanglement with religion." *Id.* at 252 (quoting *Walz*, 397 U.S. at 674). The Executive Order fails every prong of the *Lemon* test and violates the Establishment Clause.

b. The States are likely to prevail on the Equal Protection claim

The Executive Order also violates the Equal Protection Clause, which prohibits the government from impermissibly discriminating among persons based on religion or national origin. *De La Cruz v. Tormey*, 582 F.2d 45, 50 (9th Cir. 1978). Significantly, the States need not show that intent to discriminate "was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Acre v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (quoting *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp*, 429 U.S. 252, 265-66 (1977)).

Classifications based on religion are inherently suspect and subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Such laws must be narrowly tailored to serve a compelling governmental interest. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). Here, the Executive Order creates classifications based on religion and national origin. By its terms, the Executive Order singles out people from seven countries for a blanket ban on entry to the United States. Sec. 3(c). This ban applies to lawful permanent residents, visa holders, asylees, and refugees from the seven countries who live in the United States. The Executive Order also expressly states that Defendants will give priority in future refugee claims "on the basis of religious-based persecution," but only if "the religion of the individual is a minority religion in the individual's country of nationality." Sec. 5(b).

The President's decision to adopt suspect classifications in violation of federal law demands strict scrutiny—a test that this Executive Order cannot remotely withstand. Neither the temporary ban on entry of all non-citizens from certain countries nor the barring of all refugees is narrowly tailored to further a compelling government interest. On the contrary, the Executive Order is profoundly overbroad. Although it purports to aim to prevent terrorism, it sweeps within its ambit infants, children, people with disabilities, victims of terrorism, those who served alongside the United States Armed Forces in Iraq, visaholders who have passed a rigorous screening process, and many others who the government has no reason to suspect of terrorism. Defendants cannot establish that this blanket ban—rather than less extreme measures—is warranted. This is particularly so given that Defendants have not shown that the current vetting procedures are inadequate and have not identified a basis for believing that there is a particularized threat warranting such severe actions.

See 9th ECF 28, Ex. A ¶¶ 3-4) (Decl. Nat'l Security Advisors) (concluding that there is no national security purpose for a total bar on entry from the seven countries).

At the same time, the Executive Order is under-inclusive with respect to its stated goal. Although it cites the attacks of September 11, 2001, as a rationale, it imposes no restrictions on travelers from the countries whose nationals carried out those attacks (Egypt, Lebanon, Saudi Arabia, and the United Arab Emirates). WD ECF 4 ¶ 8, Ex. B. In reality, as nearly a dozen national security and intelligence officials emphatically declared—the Executive Order "ultimately undermines the national security of the United States, rather than making us safer." 9th ECF 28, Ex. A (Decl. Nat'l Security Advisors ¶ 3).

Because the Executive Order is both radically overbroad and under-inclusive, it cannot withstand *any* level of review, let alone strict scrutiny. The Executive Order's "sheer breadth is so discontinuous with the reasons offered for it that the [Executive Order] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996). And the inference of animus created by the over- and under-inclusiveness of the Order is here confirmed by substantial direct evidence that the Executive Order was prompted by animus towards Muslims, as the panel recognized. *Washington*, 2017 WL 526497, at *10. In short, the Order "is at once too narrow and too broad," and shows hints of its true purpose. *Romer v. Evans*, 517 U.S. at 633; *see also United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality must at the very least mean that bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group.").

Finally, the fact that the seven countries targeted by the Executive Order are the same seven countries that Congress and the Executive Branch identified in restricting the visa-waiver program in 2015 and 2016 does not mean that this Executive Order passes constitutional muster. Requiring travelers (of any nationality) who were present in the seven countries after a given date to get a visa is a far cry from a blanket ban on all travelers from these countries. Further, the fact that these seven countries may once have been selected for a legitimate purpose does not prove that they were chosen here with no improper motive. *See McCreary*, 545 U.S. at 864.

In short, the Executive Order violates the equal protection clause. It is motivated by discriminatory animus and cannot survive any level of review.

3. Defendants failed to show a likelihood of success on the States' statutory claim

Although the panel did not reach this claim, Defendants have also failed to show a likelihood of success on appeal with respect to the States' statutory claim. The Order's nationality-based classifications violate the Immigration and Naturalization Act (INA).

Defendants' assertion of limitless power to issue this Order is based in large part on 8 U.S.C. § 1182(f), which delegates to the President authority to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." Section 1182 was enacted at the height of the McCarthy-Red Scare era, as part of the Immigration and Nationality Act of 1952. Pub. L. 82-414.

Any argument that section 1182(f) allows discrimination ended thirteen years later with the passage of the Immigration and Nationality Act of 1965. Pub. L. No. 89-236 (Oct. 3, 1965). Enacted on the heels of the Civil Rights Act and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 profoundly changed the law by abolishing the national origin quota system, establishing a uniform quota system, and prohibiting discrimination on the basis of race and national origin in issuing visas. *Olsen v. Albright*, 990 F.

Supp. 31, 37 (D.D.C. 1997) (citing Pub. L. No. 89-236). The legislative history of the 1965 INA amendments "is replete with the bold anti-discriminatory principles of the Civil Rights Era." *Id.* at 37.

The 1965 INA amendments state that: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). "Congress could hardly have chosen more explicit language." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). Moreover, the statute lists three specific circumstances under which nationality can be considered, none of which apply here, making clear that Congress intended to prohibit other preferences or discrimination based on nationality. 8 U.S.C. §1152(a)(1)(A); *see, e.g.*, *Setser v. United States*, 556 U.S. 231, 237-39 (2012) (applying the doctrine of *expressio unius est exclusio alterius*).

Section 3(c) of the Executive Order directly violates 8 U.S.C. § 1152(a)(1)(A) by discriminating on the basis of nationality, forbidding entry by aliens from seven countries. *See* Dep't of Homeland Security, *Fact Sheet: Protecting The Nation From Foreign Terrorist Entry To The United States*

(Jan. 29, 2017), https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states (identifying the nationalities impacted by section 3(c) of the Executive Order).

Defendants offer two primary counterarguments. Both fail.

First, Defendants argue that other presidents have issued orders excluding immigrants based in part on nationality. But each was substantially narrower than the order here and focused more tightly on culpable conduct in or by the targeted nation. *See* Congressional Research Service, *Executive Auth. to Exclude Aliens: In Brief* (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf. For example, President Clinton barred the entry of members of the military junta in Sierra Leone, and President George W. Bush barred foreign government officials responsible for a failure to combat human trafficking. *Id.* Each action was taken in response to a discrete national security or policy concern. No president in the modern era has issued this type of blanket ban on travelers from multiple countries in blatant violation of 8 U.S.C. § 1152. Permitting this conduct to stand would return the nation to a shameful period in our history when distinctions based on national origin were permitted. *Cf. Chae Chan Ping v. U.S.*, 130 U.S. 581, 595, 606 (1889) (sustaining the Chinese Exclusion Act because the Chinese "remained strangers in the land").

Second, Defendants argue that 8 U.S.C. § 1152(a)(1)(A) governs only the issuance of visas, while § 1182(f) governs the separate authority to regulate "admission" to the United States. But the Order says that visas of those from the seven countries are "blocked,"[19] and Defendants had in fact revoked a large number of visas before the district court enjoined them from doing so.[20] In any event, even if the Order dealt only with admission and not visas, Defendants' argument would mean that although Congress ordered the President not to discriminate in issuing visas, Congress intended to leave him completely free to decide based on nationality who can actually use their visas to come to the country. That makes no sense. *See, e.g.*, *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013) (noting that in construing a statute, courts must attempt to "fit, if possible, all parts into a harmonious whole"); *see also* 9th ECT 65-2 (Brief of Amici Curiae National Immigrant Justice Center and ASISTA).

In sum, Defendants' inability to show a likelihood of success on the States' INA claim provides added support for the panel's denial of a stay.

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[19] *See* Sec. 3(g) (providing that "nationals of countries for which *visas and other benefits are otherwise blocked*" may obtain entry "on a case-by-case basis") (emphasis added).

[20] *See infra* n.7.

F. The Panel Correctly Concluded that Defendants Failed to Show That They Would Suffer Irreparable Injury Absent a Stay

The panel correctly concluded that Defendants failed to show that a stay is necessary to avoid irreparable injury. *Washington*, 2017 WL 526497, at *10. Defendants failed to present any evidence whatsoever that national security concerns justified the Order, and as a result, they failed to show that a return to the status quo would result in any harm. These failures are fatal to their claim.

Defendants argued that a stay was necessary for the security of the nation. 9th ECF 14 at 24. But as the panel recognized, Defendants did not offer a shred of evidence that the Order furthered that objective. Defendants submitted no evidence explaining the need for the Order in either their briefing before the district court or their briefing before this Court. Nor did Defendants offer any record evidence in support of the Order when pressed to do so by the panel during oral argument. *See* Oral Argument at 7:10-12:15; 1:05:14-1:05:46, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885. In fact, the only evidence in the record on the issue of national security is a declaration from nearly a dozen high ranking national security officials that the Executive Order "cannot be justified on national security or foreign policy grounds" and "ultimately undermines the national security of the United States[,]" which Defendants did not challenge. 9th ECF 28-1, Ex. A ¶ 3.

Accordingly, as the panel correctly noted, although Defendants' interest in combating terrorism "is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), Defendants have "done little more than reiterate that fact." *Washington*, 2017 WL 526497, at *10.

In light of the complete lack of evidence and argument explaining the urgent need for the Executive Order, Defendants have also failed to show that they would suffer irreparable injury absent a stay. They assert that the district court's order imposes irreparable harm because it constitutes "[j]udicial second-guessing" and intrudes on separation of powers. 9th ECF 14 at 25. But the panel properly rejected these arguments, because there is no precedent to support Defendants' claim of unreviewability and because any separation of powers injury can be vindicated in the full course of the litigation. *Washington*, 2017 WL 526497, at *11. *See also, e.g.*, *Lopez v. Hecker*, 713 F.2d 1432, 1434 (9th Cir. 1983) (declining to stay district court order "restrain[ing]" the Secretary of Health and Human Services from implementing an announced policy where "separation of powers" was at issue).

Moreover, as the panel correctly noted, the district court's order "merely returned the nation temporarily to the position it has occupied for many previous years." *Washington*, 2017 WL 526497, at *10. Without anything in the record to suggest that this poses any risk to national security, Defendants cannot show that a return to the status quo would cause an irreparable injury. On the contrary, as discussed next, it is the *States* and their residents that would suffer irreparable injury if this Court granted Defendants' request for a stay.

G. The Panel Correctly Concluded that the Balance of Hardships and Public Interest Tip in the States' Favor

As the panel correctly recognized, the States have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure the States and multiple other parties. *Washington*, 2017 WL 526497, at *11.

The Executive Order had immediate and far-reaching effects within the States of Washington and Minnesota. It separated families, stranded university students and faculty members abroad, stripped State residents of personal freedoms, and harmed the States' businesses and education institutions. As the panel correctly determined, these "are substantial injuries and even irreparable harms." *Washington*, 2017 WL 526497, at *11 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

Defendants claim that national security requires these harms. But this Court need not and should not allow constitutional violations merely based on Defendant's unsupported invocation of national security concerns. *See* 9th ECF 28, Ex. A, ¶ 4; *Hassan v. City of New York*, 804 F.3d 277, 306-07 (3d Cir. 2015) ("[I]t is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights.").

Defendants also claim that the Executive Order's discretionary waiver provisions are a sufficient protection for those who would suffer unnecessarily. But the panel recognized the many problems with this argument and properly rejected it as unworkable and unpredictable. *See Washington*, 2017 WL 526497, at *11 ("[Defendants have] offered no explanation for how these provisions would function in practice: how would the 'national interest' be determined, who would make that determination, and when?").

In addition, the panel also correctly recognized that there are compelling public interests in favor of the States. Although the panel found public interests on both sides, it acknowledged that the public "has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 2017 WL 526497, at *11. And as this Court has repeatedly made clear, "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres*, 695 F.3d at 1003 (internal quotation marks omitted) (quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002)).

In short, when balancing the hardships and weighing the States' important public interests against Defendants' bare assertions of national security concerns, it is clear that the balance of equities and public interest tip sharply in favor of the States. The panel properly concluded that a stay was not justified.

H. The Panel Properly Declined to Narrow the Injunction

The panel also properly rejected Defendants' argument that the district court order is "overbroad" because (1) it is not limited to lawful permanent residents and previously admitted aliens who are temporarily abroad; and (2) it applies nationwide. *Washington*, 2017 WL 526497, at *9. Neither argument provides a basis for narrowing the preliminary injunction.

First, as the panel explained, limiting the injunction to lawful permanent residents and previously admitted aliens who are temporarily abroad would leave citizens without relief as they wait for spouses and family members to return home, and loved ones to visit. *Id.* (citing *Din*, 135 S. Ct. at 2139, 2142 (six Justices declining to adopt a rule categorically barring citizens from asserting a liberty interest in an alien spouse's receipt of a visa). It would also exclude undocumented residents of the States, who possess due process rights. *Washington*, 2017 WL 526497, at *9 (citing *Zadvydas*, 533 U.S. at 693). As the panel cautioned, "[t]here might be persons covered by the TRO who do not have viable due process claims, but the Government's proposed revision leaves out at least some who do." *Washington*, 2017 WL 526497, at *9. If Defendants' believe the Executive Order should be limited, they are always free to withdraw and narrow the executive order themselves.[21]

Second, the panel properly held that the national reach of the TRO is appropriate. *Id.* The Fifth Circuit has held that the immigration laws must be uniform and cannot be confined to particular states. *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (citing *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Even if a patchwork application of immigration laws were permitted, the panel correctly noted Defendants' failure to propose an alternative to the TRO that "accounts for the nation's multiple ports of entry and interconnected transit system." *Washington*, 2017 WL 526497, at *9.

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[21] Furthermore, though the panel saw no need to reach this issue, narrowing the injunction would not remedy the Establishment Clause harms that the Order is causing to the States and all of our residents. Establishment Clause violations are irreparable harms, and the Clause was designed in part to protect states from the federal government establishing a national religion. *See, e.g., Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (an Establishment Clause violation "is sufficient, without more, to satisfy the irreparable harm prong"); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (same); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 621 (9th Cir. 1996) (O'Scannlain, J., concurring) ("[C]oncerns about federalism . . . motivated ratification of the Establishment Clause.")

IV. CONCLUSION

There is no basis for en banc review here. The motions panel properly denied Defendants' motion for stay in an opinion that carefully applied precedent and creates no conflict. The Court should deny en banc reconsideration and allow the merits of the preliminary injunction appeal to proceed.

RESPECTFULLY SUBMITTED this 16th day of February 2017.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c) the Appellees state that there are no related cases.

CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 27, the attached States' Brief Regarding Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 11,641 words.

February 16, 2017

s/ Noah G. Purcell
NOAH G. PURCELL, WSBA 43492

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

February 16, 2017

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